

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of Rate Appeal of
Wedgewood Health Care Center, Inc.

**ORDER COMPELLING
DISCOVERY**

The above matter is pending before the undersigned Administrative Law Judge on a Motion to Compel filed by the Minnesota Department of Human Services. Paul M. Landskroener, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, filed the motion on behalf of the Department of Human Services (hereinafter referred to as "the Department" or "DHS"). Samuel D. Orbovich, Attorney at Law, Orbovich & Gartner, 445 Minnesota Street, Suite 710, St. Paul, Minnesota 55101, filed a reply on behalf of the Petitioner, Wedgewood Health Care Center, Inc. The record with respect to this motion closed on April 25, 1996, with the receipt of the Department's Reply Brief.

Based upon all of the files, records, and proceedings herein, and for the reasons discussed in the Memorandum below, IT IS HEREBY ORDERED as follows:

1. The Petitioner's Answers did not respond to the Department's Interrogatories to Facility (Set II). Petitioner's Answers and the objections accompanying them, were not served or filed within 30 days of the discovery request. The Petitioner has not waived its objections to the Department's Interrogatories through its late filing.

2. The Petitioner has not shown that the information sought is protected by attorney-client privilege.

3. The Minnesota Data Practices Act (Minn. Stat. Chapter 13) does not prevent discovery of information from Petitioner.

4. The Department has shown that the information sought may lead to the discovery of information that is relevant to the subject matter of this contested case.

5. The Petitioner has shown that the information requested is of a sensitive nature and that the former facility administrator has a privacy interest in the information requested by the Department. Petitioner and the former facility administrator are entitled to a protective order restricting the dissemination and use of the information and documents requested by the Department.

6. The Petitioner shall submit full and complete Answers to the Department's Department's Interrogatories to Facility (Set II) by June 10, 1996. The Department shall comply with the Protective Order issued in conjunction with this Order regarding all information received pursuant to those Interrogatories and this Order.

Dated this ____ day of May, 1996.

BARBARA L. NEILSON

Administrative Law Judge

MEMORANDUM

The information sought in the Department's Interrogatories to Facility (Set II) relates entirely to any contact between the Minnesota Board of Nursing Home Administrators (hereinafter referred to as "the Board") and the Petitioner's administrator for the rate years at issue in this matter. DHS has obtained a copy of a Stipulation and Consent Order (hereinafter referred to as "the Consent Order"), that reflected an agreement between the Board and the administrator that the administrator would voluntarily surrender his nursing home administrator license to the Board. DHS asserts that the discovery sought is relevant to determine if the compensation to Petitioner's nursing home administrator was for services actually rendered or whether the compensation was a pass-through of profits. The resolution of that question can determine whether the cost should be allowed to the Petitioner, or whether the Department's disallowance should be upheld.

The Department's rationale for requesting this discovery is that adverse action against the nursing home administrator's license by the Board is evidence that "it is less

likely the extraordinary payments were really for services he rendered to the facility.” Department’s Memorandum in Support, at 8. In addition, DHS asserts that the “reasonable and prudent business person standard” in Minn. Rule 9549.0035, subp. 8B (1995), is less likely to have been met by the Petitioner in paying the administrator if adverse action was being taken against that administrator’s license to manage the Petitioner’s facility. *Id.* The final argument advanced by the Department is that the information sought will bear on the truthfulness of the administrator’s answers in his deposition, taken as part of this contested case proceeding. *Id.* at 9.

Petitioner maintains that the information sought by DHS is irrelevant to the issues presented in this matter, since the administrator was properly licensed to serve as the facility administrator and there is no correlation between any license action and the compensation to be paid to any administrator. There is no direct evidence of a link between license actions and compensation in the record. However, the standard to be met in discovery is not whether relevance can be demonstrated, but whether the potential for discovery of relevant evidence is present. As a general matter, anything that relates to the quality of a nursing home administrator’s performance is potentially relevant to the reasonability of that administrator’s compensation. For the evidence to be admissible at hearing more will be required (e.g. evidence of a pattern or practice of basing compensation on adverse licensing actions). At this stage, only the potential for relevance need be shown and the Department has done so.

The Petitioner has asserted that the information sought is protected by the administrator's attorney-client privilege. The information sought consists of full disclosure of communications received from the Board regarding the administrator's license, communications regarding a replacement or assistant for the administrator, and whether any adverse action has been taken by the Board against the administrator's license. The request for information is directed at information directed from the Board to the administrator, and the administrator's replies to the Board. There is no information sought that could fall under the definition of a privileged communication between attorney and client, since the information is either coming from or going to the Board, which is not the administrator's attorney. The Petitioner has not shown that the information sought is protected by attorney-client privilege.

The information underlying the Consent Order between the Board and the administrator is asserted by Petitioner to be private data as defined under Minn. Stat. § 13.02. Petitioner cites Doe v. State Board of Medical Examiners, 435 N.W.2d 45 (Minn. 1989), as supporting confidentiality of the data maintained by the Board on the administrator. The cited case involves a physician, whose investigatory records are governed by Minn. Stat. §§ 147.01 and 147.091, subd. 6. making such records private data until a finding of misconduct by the Board of Medical Examiners, at which time the data becomes public. The specific issue addressed in Doe is whether the factual basis for dismissed complaints, classified nonpublic under the statute, can be included in the public decision of the Board of Medical Examiners finding discipline appropriate on other

grounds. Doe holds that such nonpublic information cannot be included in a public document. Id. at 50.

Although the holding in Doe is not on point, Minn. Stat. § 13.41 classifies the “agreement and specific reasons for the agreement” as public data where there has been a stipulation and no public hearing on a licensing matter. Minn. Stat. § 13.41, subd. 4 (1994). Otherwise the “inactive investigative data relating to violations of statutes or rules; and the record of any disciplinary proceeding except as limited by subdivision 4. Minn. Stat. § 13.41, subd. 2(a). The data sought by the Department, in the possession of the Board, is private data. Private data is defined as “not public” and “accessible to the subject of the data.” Minn. Stat. § 13.02, subd. 12.

Although the data concerning the administrator is private as maintained by the Board, Petitioner has fundamentally misconstrued the application of Minn. Stat. Chapter 13. The statute only limits the actions of government agencies regarding the treatment of data. See Minn. Stat. § 13.03, subd. 6. Neither the administrator nor the Petitioner is a government agency and neither is covered by the limitations on dissemination of data. The Department’s discovery request only covers information that is within the possession of Petitioner or the administrator. The Department’s request does not require the administrator to “waive” his right to data privacy, since there is no requirement that he make a request for data from the Board. The Minnesota Data Practices Act does not prevent discovery of information within the possession of Petitioner or the former

administrator of the facility on the basis of that information's classification with a State agency.

The classification of the information requested and the potential connection to the professional reputation of the administrator demonstrate that the administrator has a legitimate privacy interest in the data requested by the Department. The Department has suggested that a protective order be issued to address those concerns. The Judge agrees and has issued a Protective Order limiting the use and further dissemination of the information contained in Petitioner's Answers to the Department's discovery request. The Protective Order contains provisions to ensure that other individuals who may have a privacy interest in the information sought by the Department are also protected.

B.L.N.